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Supreme Court, U.S.
FILED

Docket No. 01-225 JUL 30 2001

OFFICE OF THE

IN THE
SUPREME COURT OF THE UNITED STATES

LINDA MORRISON BOCZAR
and **JAMES J. BOCZAR**

Petitioners

versus

DAVID KINGEN, et. al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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26 pp

QUESTION PRESENTED FOR REVIEW

I.

Whether Indiana's Meridian Street Preservation Act, Ind. Code § 36-7-11.2-61 is void for vagueness under the standards enumerated in *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 n.7 (1982) and *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Linda Morrison Boczar
2. James J. Boczar
3. David Kingen
4. Helga Behroozi
5. Larry Dorfman
6. David Halvorson
7. Rebecca Marcus
8. Jane Nolan
9. Robert Pinkley
10. Meridian Street Preservation Commission
11. Gene Lausch
12. Rhonda J. Fields
13. City of Indianapolis
14. Kipp Normand
15. Roll McLaughlin

TABLE OF CONTENTS

	PAGE
Questions Presented For Review In The Petition	i
Parties To Be Proceedings In Be Court's Below	ii
Table Of Contents	iii
Table Of Authorities	iv
Opinions Of The Courts Below	v
Statement Of The Basis For Jurisdiction In This Court	1
Constitutional Provisions And Statutes Involved In The Case	2
Statement Of The Case	6
Argument For Allowing The Petition	16
Appendix (See separate volumes A and B)	

TABLE OF AUTHORITIES

CASES	PAGE
Boczar v. Kingen, 201 U.S. App. Lexis 8833 at 10 (May 1 2000)	18
Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)	16
Connally v. General Constr. Co., 269 U.S. 385,389 (1926)	16
Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)	16
Mayes v. City of Dallas, 747 F.2d 323,325 (5th Cir 1984)	18
Parker v. Levy, 417 U.S. 733, 756 (1974)	16
Park *Home v. City of Williamsport*, 680 A.2d 835, 838 (Pa. 1996)	19
Smith v. Goguen, 415 U.S. 566, 578 (1974)	16
United States v. Mazurie, 419 U.S. 544, 550 (1975)	16
United States v. National Dairy Products Corp., 372 U.S. 29, 32-33, 36 (1963)	16
United States v. Powell, 423 U.S. 87, 92-93 (1975)	16
Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495 n.7 (1982)	16

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 2001 U.S. App. LEXIS 8833. JAMES J. BOCZAR and LINDA MORRISON BOCZAR, Plaintiffs-Appellants, v. DAVID KINGEN, et al., Defendants-Appellees. Nos. 00-1907 and 00-3259 (May 1, 2001, Decided). The opinion is provided in Appendix A.

The "Entry After Trial, Containing Findings of Fact and Conclusions of Law" of the United States District Court for the Southern District of Indianapolis, Indianapolis Division is reported at 2000 U.S. Dist. Lexis 11615. LINDA MORRISON BOCZAR and JAMES J. BOCZAR, Plaintiffs, vs. DAVID KINGEN, et. al., IP 99-0141-C-T/G March 9, 2000.). The opinion is provided in Appendix B.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

1. The opinion and order of the United States Circuit Court for the Seventh Circuit was entered on May 1, 2001.

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3

3. The Attorney General was a party at both the trial and appellate court level and has been duly served with the Petition for Writ of Certiorari and the two Appendices in satisfaction of Supreme Court Rule 29.4 (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1 of the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ind. Code § 36-7-11.2-61 provides in pertinent part:

> **Construction, alteration or demolition on Meridian Street.**
>
> (a) A person may not construct on Meridian Street property a structure or feature or reconstruct, alter, or demolish Meridian Street property unless the following conditions have been met:

....

(2) A certificate of appropriateness has been issued by the commission as provided in this section.

(b) After the filing of an application for a certificate of appropriateness, the commission shall determine whether the proposed construction, reconstruction, or alteration of the structure in question:

(1) Will be appropriate to the preservation of the area comprised of Meridian Street and bordering property; and

....

(c) In determining appropriateness, the commission shall consider, in addition to other factors that the commission considers pertinent, the historical and architectural style, general design, arrangement, size, texture, and materials of the proposed work and the relation of the proposed work to the architectural factor of other structures in the area.

Ind. Code § 36-7-11.2-27 provides

> The commission shall prepare, adopt, and promulgate the rules and regulations that are necessary, desirable, or convenient to the orderly administration of commission affairs and to the implementation of this chapter in accordance with the intent and purpose. The rules and regulations shall be made available in writing to any person requesting a copy."

Ind. Code § 36-7-11.2-1 provides:

The purpose of Chapter 36-7-11.2 is stated as follows:

(a) The purpose of this chapter is to preserve:

(1) from deterioration;

(2) from improperly conceived or implemented change; and

(3) for the continued health, safety, enjoyment, and general welfare of the citizens of Indiana; a historic, scenic, esthetically pleasing, and unique part of a street lying with Indianapolis constituting the backbone of a unique residential area.

(b) The general assembly intends, by passage of this chapter, to:

(1) encourage private efforts to maintain and preserve that part of the street and other similar streets and areas in Indiana;

(2) promote orderly and proper land usage; and

(3) preserve significant tourist attractions of historical and economic value in Indiana;

by limiting and restricting unhealthful, unsafe, unaesthetic, or other use of unique areas that would be inconsistent with their character as tourist attractions and with the general welfare of the public.

Ind. Code § 36-7-11.2-59 provides in pertinent part:

Erection or alteration of structure on Meridian street.

A new structure may not be erected upon a parcel of Meridian Street property or an existing

A new structure may not be erected upon a parcel of Meridian Street property or an existing structure upon the property may not be altered if the structure would do any of the following:

....

(7) Substantially encroach upon the view and exposure of a residential structure on a neighboring property.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 14(g)(ii), the basis for federal jurisdiction in the district court's jurisdiction was pursuant to a Notice of Removal filed by the Defendant City of Indianapolis in accordance with 28 U.S.C. §§ 1441 and 1446. The complaint alleged claims arising under the Fifth and Fourteenth Amendment to the U. S. Constitution and 28 U.S.C. § 1983; i.e., federal questions. The Notice of Removal was timely; the original complaint was file in Marion County Superior Court on January 28, 1999 and the Notice of Removal was filed in the district court on February 5, 1999.

The court of appeal's jurisdiction is based upon right of appeal from a final judgment rendered in a district court. 28 U.S.C. § 1291.

1. Facts.

Petitioner, Dr. Linda Morrison Boczar purchased a home at 4821 North Meridian Street, Indianapolis, IN 46208 on September 3, 1996 for $189,500. The home had three bedrooms, two baths, with between 2500 and 2600 square feet of living space. The home was a one story ranch style, built in 1949/1950 and occupied by its original builders / owners (Cassadys) until the death of the Bernice M. Cassady. From 1950 to 1996, the home had never had a major renovation. The home sits on a 146 by 390-foot lot.

The home at 4821 lies within the jurisdiction of the Meridian Street Preservation Commission and is subject to the Meridian Street Preservation Act ("MSPA"), Ind. Code §§ 36-7-11.2-1 to 36-7-11.2-67. The MSPA was enacted more than 30 years ago.

There are many design styles in the Meridian Street area. There are four major design styles: Italianate, Tudor, French Eclectic and Ranch. There are also various other styles. There are 22 ranch-style homes within the jurisdiction of the MSPC and 35 non-contributing homes out of 170 homes with a large church and a high-rise condominium.

Dr. Linda Morrison Boczar was the sole titleholder of the property and sole plaintiff in this action. On May 24, 1999, Dr. Boczar issued a deed for the property to her husband and herself (the house had been purchased with joint funds). At that time, Petitioner James J. Boczar was then permitted to join the litigation has a plaintiff.

Petitioner Dr. Boczar filed and obtained a Certificate of Appropriateness from the Meridian Street Preservation Commission for a major renovation of the home at 4821 North Meridian Street. The construction estimates greatly exceeded the Boczars' budget so the renovation was shelved for over a year.

Subsequently, Dr. Boczar contracted with a contractor, who had revised the plans to bring the estimated cost to 50% of the first set of plans. The contractor obtained the necessary permits and began the renovation in September 1998.

The differences between the original plans and the building plans caused the City of Indianapolis to issue a stop-work order and revoke the permits in November 1998. The City of Indianapolis's stop-work order required the Petitioners to get approval from the Meridian Street Preservation Commission ("MSPC") for the contractor's building plans.

The Petitioners appeared before the MSPC in December 1998 and January 1998 to amend the original Certificate of Appropriateness. The

Commission on both occasions stated that they did not have enough information in order to make a decision. In January 1999, the Commission denied amendment, because they did not have enough information.

Petitioner Mr. Boczar asked the Chairman of the MSPC, Defendant David Kingen, what was the appropriate next step. Kingen said to ask for a rehearing of the request to amend the original Certificate of Appropriateness. Petitioner Boczar attended the March, and April trying to get a hearing of the Petitioners' rehearing of their request to amend. Mr. Boczar's rehearing was continued twice for alleged procedural defects.

At the May 18, 1999 meeting of the MSPC never discussed the substance of the Boczars' rehearing request. As soon as the Boczars' application was called on the agenda, the Commission voted not to hear it and to require a new application for a new Certificate of Appropriateness.[1]

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[1] The district court said the "Boczar application for an Amendment to their Certificate of Appropriateness was on the agenda for and discussed during the MSPC's May 18, 1999 meeting. The MSPC Order discussed by the district court, (which was never introduced into evidence; Exhibit A to the State's Trial Brief Anticipating Motion for Involuntary Dismissal) contradicts the transcript of the May 18, 1999 (Plaintiffs Ex. 2) The Order is totally fraudulent.

> MR. PINKLEY: Mr. Chairman, I'd like to make a comment and a motion before we began. We've been looking at this a long, long time. There's been all kinds of convoluted activities going on around it. The original petition was submitted in' 96 and approved in January of 1997, that petition stands, and I think that petition should stand and be allowed and approved for what was on the drawings that were submitted and which are on file with the Commission.

2. Constitutional Challenge

A. The Statute Challenged

The Petitioners challenge as unconstitutionally vague that portion of the Meridian Street Preservation Act which gives the MPSC the authority to issue Certificates of Authority and establishes the criteria under which it may grant such Certificates.

(Continued)
Aside from that, I think that this different set of plans requires a different petition and a whole separate review by the Commission. And I would move that the issue not be addressed today, because this is based on an amended version of the old petition, but that the Boczars be required to submit a new petition for a Certificate of Appropriateness with whatever drawings and information they've got to go along with that.

MS. MARCUS: Well, I would agree. We have already approved their drawings previously, so I don't think rescinding that is the issue. But I think that a whole new application needs to be made.

MR. PINKLEY: Is that a second?

MS. BEHROOZI: I concur with that..

MS. MARCUS: I second that, yes. I second that.

....

MR. KINGEN: Mark your ballots and passed them to Mrs. Nolan, please.

MS. NOLAN: Five yes and two no.

MS. MARCUS: Five yes/two no? So the original one stands and we don't hear it any further.

(Trans. Of Meeting of May 18, 1999, Pl. Exhibit 2 at p. 14, l. 3 through p. 22, l. 1.)

Specifically, the Petitioners challenge Ind. Code § 36-7-11.2-61 which provides in pertinent part:

> **Construction, alteration or demolition on Meridian Street.**
>
> (a) A person may not construct on Meridian Street property a structure or feature or reconstruct, alter, or demolish Meridian Street property unless the following conditions have been met:
>
> ....
>
> (2) A certificate of appropriateness has been issued by the commission as provided in this section.
>
> (b) After the filing of an application for a certificate of appropriateness, the commission shall determine whether the proposed construction, reconstruction, or alteration of the structure in question:
>
> (2) Will be appropriate to the preservation of the area comprised of Meridian Street and bordering property; and
>
> ....
>
> **(c) In determining appropriateness, the commission shall consider, in addition to other factors that the commission considers pertinent, the historical and architectural style, general design, arrangement, size, texture, and materials of the proposed work and the relation of the proposed work to the architectural factor of other structures in the area.**

Ind. Code § 36-7-11.2-61(c) is the only provision in the MPSA which establishes the criteria for what is appropriate in the Meridian Street historic district.[2]

B. The Absence of Interpretive Regulations

The MSPC's enabling statute requires the commission to adopt rules.

> The commission shall prepare, adopt, and promulgate the rules and regulations that are necessary, desirable, or convenient to the orderly administration of commission affairs and to the implementation of this chapter in accordance with the intent and purpose. The rules and regulations shall be made available in writing to any person requesting a copy."
> Ind. Code § 36-7-11.2-27.

The MPSC has adopted procedural rules. Ind. Adm. Code Title 925. The MPSC has never adopted any substantive rules. The Commissioners were advised on more than one occasion to adopt substantive rules.

At the December 17, 1991 MSPC Meeting Mr. Jim Schmidt, Legal Counsel to the Commission from the Indiana State Attorney General's Office, was present to report to the Commission. The subject was historic preservation law and how it is affecting preservation commissions. He stressed that proper rules, rather than mere guidelines, will enable commissions to better withstand possible lawsuits.

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[2] The references in the MSPA to such terms as "substantially greater density" Ind. Code § 36-7-11.2-59(1); "substantially smaller or larger in size and scale" Ind. Code § 36-7-11.2-59(2); "significantly less in the average setback" Ind. Code § 36-7-11.2-59(3) are not involved in this constitutional challenge. The Petitioners challenge is to the lack of standards contained in Ind. Code § 36-7-11.2-61(c).

Mr. Schmidt recommended that the Meridian Street Preservation Commission undertake developing ascertainable standards and establishing rules, rather than merely having guidelines.

At the February 16, 1993 Meeting, Mr. James Schmidt, Legal Counsel to the Commission from the Indiana State Attorney General's Office, maintained that anything that creates a requirement for the people with whom we deal needs to have that requirement adopted into a Rule. If "ascertainable standards" are not stated, a decision is vulnerable to court challenge.

The MPSC permitted Ms. Amy S. Kotzbauer, a graduate student at Ball State University to work with the Commission to produce a set of Design Guidelines for the North Meridian Street Preservation Area. This was her thesis project.

These "North Meridian Street Preservation Area Design Guidelines were never formally adopted as Administrative Rules. The Design Guidelines" (Plaintiffs Exhibit 18) were never informally adopted.[3]

The only vote concerning the Design Guidelines which is reported in the Minutes of the MSPC occurred at the May 18, 1993 meeting of MSPC:

> MOTION: **Mr. Shula moved, Mr. McLaughlin second, that, if and when the Guidelines are approved, they will not be made a part of any legislation**. Ayes: Kingen, Gadski, Halvorson, Landrigan, Markuson, McLaughlin, Scott, Shula,

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[3] "This publication has never been formally adopted by the MSPC as an official guideline or requirement of construction in the area. However, they are referred to by some of the Commissioners from time to time in considering requests for Certificates of Appropriateness." Entry After Trial, at 7.

White. Noes: None. **Motion Adopted by a vote of 9-0.** (emphasis added).

The use of the unadopted and unapproved Design Guidelines varies greatly among MSPC members.[4]

C. Absence of Any Interpretive Guidance

The decisions made by the MSPC have no precedential value. The MSPC, even with the same members, is not bound by its earlier decisions.

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[4] Defendant Member Pinkley binds himself to the Guidelines as his Bible. Pinkley Dep. P. 41 L. 13-19. Tr. P. 312 L. 22-25. He also consults with a group of people at the Meridian Street Foundation who have lived on the street for a long time in order to obtain "precedents or information" about what has gone on, on the street. Tr. P. 311 L. 16-23.

Defendant Member Laurence Dorfman testified:

Q Would it be far to characterize it as you don't look at the Design Guidelines as law, but you look at it as guidance?

A I don't even look at it as guidance; I look at it as an opinion by someone else.

Dorfman Dep. P. 12 L. 17-21.

Defendant Member Roll McLaughlin testified:

Q Okay. Is there strict adherence to the guidelines? I mean, are they – you must fall within the guidelines or it can't be approved?

A There have been cases where some liberties have been taken; however, for the most part I would say that guidelines are specifically followed.

Defendant Chairman David Kingen said the Guidelines are simply advisory. Kingen Dep2. P. 11 L. 6-10.

The challenged statute has not been interpreted by any Indiana Court.[5]

The challenged statute can not be clarified by a request for an administrative ruling or a request for any guidance. There is no method to obtain such a ruling or guidance.

The only statutory provision in Indiana Code, Chapter 36-7-11.2, which may have an interpretative bearing on the challenged Ind. Code Section 36-7-11.2-61(c) is stated in Indiana Code Section 36-7-11.2.1. and it provides:

> The purpose of Chapter 36-7-11.2 is stated as follows:
>
> (a) The purpose of this chapter is to preserve:
>
> (4) from deterioration;
>
> (5) from improperly conceived or implemented change; and
>
> (6) for the continued health, safety, enjoyment, and general welfare of the citizens of Indiana; a historic, scenic, esthetically pleasing, and unique part of a street lying with Indianapolis constituting the backbone of a unique residential area.
>
> (b) The general assembly intends, by passage

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[5] The District Court criticized the Petitioners for not appealing the May 18, 2000 Order of the MSPC in Indiana state courts. The Petitioners did appeal the May 18, 2000 Order as part of a second lawsuit filed in the U. S. District Court (The case was assigned to Judge Tinder. The appeal of the MSPC's May 18th Order was one of the Counts). For various reasons, not relevant here, the Petitioners allowed this second case to be dismissed under Fed. R. Civ. Pr. 4(j). Obviously, any interpretation of the challenged statute in that case would have been by the United States District Court Judge.

of this chapter, to:

(4) encourage private efforts to maintain and preserve that part of the street and other similar streets and areas in Indiana;
(5) promote orderly and proper land usage; and
(6) preserve significant tourist attractions of significant tourist attractions of historical and economic value in Indiana;

by limiting and restricting unhealthful, unsafe, unaesthetic, or other use of unique areas that would be inconsistent with their character as tourist attractions and with the general welfare of the public.

ARGUMENT FOR ALLOWING THE PETITION

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A statute may be unconstitutionally vague, and thus violate due process, if "men of common intelligence must necessarily guess at its meaning and differ as to its application[.]"*Connally v. General Constr. Co.*, 269 U.S. 385,389 (1926).

Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495 n.7 (1982) summarizes this Court holdings in vagueness challenges to statutes which do not involve the First Amendment and says:

> "[Vagueness] challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). See *United States v. Powell*, 423 U.S. 87, 92-93 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, 36 (1963). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974). The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Such a provision simply has no core." *Smith v. Goguen*, 415 U.S. 566, 578 (1974).

Indiana Statute § 36-7-11.2-61 (c) provides:

> **(c) In determining appropriateness, the commission shall consider, <u>in addition to other factors that the commission considers pertinent,</u> the historical and architectural style, general design, arrangement, size, texture, and materials of the proposed work and the relation of the proposed work to the architectural factor of other structures in the area. ...**

All new construction or remodeling within the Meridian Street area is governed by this single paragraph. The criteria is vague and undefined, "the historical and architectural style, general design, arrangement, size, texture and materials of the proposed work and relation of the proposed work to the architectural factor of other structures in the area."

Indiana Statute § 36-7-11.2-61 is unconstitutional on its face. The statute fails to give homeowners, whose property falls within the jurisdiction of the MSPC any notice of what they can do or not do with their property. The statute is unconstitutionally vague.

The MSPC has had thirty years to develop substantive administrative rules to clarify and further define the meaning of the statute. The MPSC was mandated by the statute to develop such rules. The MPSC received legal counsel on at least two occasions by its counsel from the Office of the Attorney General of Indiana Attorney to adopt substantive rules or risk challenge to their decisions. The MPSC has never adopted a substantive administrative rule with regard

to the aesthetics or architectural or historic preservation criteria.

The North Meridian Street Preservation Area Design Guidelines were never adopted and never promulgated as an Administrative Rule by the Commission. The Design Guidelines have no force of law and are use in totally disparate fashions by the MSPC members.[6]

There is also no interpretation of this statute by Indiana Courts. So, *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) cannot help in evaluating this facial challenge to state law since there is no "limiting construction on the statute that a state court or enforcement agency has proffered."[7]

Finally, the Petitioners address the Seventh Circuit's adoption of the analysis of the District Court. "In concluding that this language was not unconstitutionally vague, the court cited 13 cases from other jurisdictions in which courts upheld historic preservation laws using similar language." Boczar v. Kingen, 201 U.S. App. Lexis 8833, at 10 (May 1 2000),

In the cases cited, the historic preservation law has interpretive regulations defining the statute. The regulations may be comprehensive as in the City of Dallas (The District Court cited *Mayes v. City of Dallas*, 747 F.2d 323,325 (5th Cir 1984), which was decided under earlier regulations which were not as

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6 Of course, having "guidelines" which are not adopted gives the MPSC the choice of saying either, "you cannot do that, because the guidelines say you should not" or "you can do that the guidelines are only informal guidelines and they do not bind the Commission."

7 Since the decision of the MSPC have no precedential value, the court's cannot even look to its prior decisions to limit or interpret this statute.

comprehensive as the current ones). Or, the regulations may simply be an adoption of the National Historic Preservation Guidelines as the regulations governing the local historic preservation board. (E.g., the City of Williamsport; the District Court cited Park *Home v. City of Williamsport*, 680 A.2d 835, 838 (Pa. 1996).

No case cited has a statute as vague as the Indiana Statute along with no regulations, no state court interpretations, no methods of obtaining a ruling or guidance and no precedential value on the commission's earlier decisions.

To all of these vagueness defects, the Petitioners add the language of Section 36-7-11.2-61(c) which says that in addition to the vague statutory standard, the MPSC may consider, **"other factors that the commission considers pertinent."**

Whatever other factors the members of the MPSC consider pertinent, no homeowner subject to their jurisdiction has any way of discerning what they are.

The effect of this vague statute is that the homeowners in the Meridian Street area have no discernable criteria governing any changes they wish to make to their homes.

If this Court finds the statute to be unconstitutionally vague, that would only impose upon the MPSC the requirement that it adopt some substantive regulations to govern its conduct. This is not a tremendous burden for a state agency, which has been in existence for 30 years. This Court should grant the Petition for Certiorari.

Respectfully submitted,

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